Application No. 1950

SUPREME COURT OF GEORGIA

ATLANTA, February 17, 1982

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

EDDIE SPRAGGINS V. WALTER D. ZANT, WARDEN

Upon consideration of the application for a certificate of probable cause to appeal filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Joline B. Williams Clerk.

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

EDDIE SPRAGGINS,	:	
	:	
PETITIONER	:	
	:	
VS.	:	
	:	HABEAS CORPUS
WALTER D. ZANT,	:	FILE NO. 5195
WARDEN, GEORGIA	:	
DIAGNOSTIC AND	:	
CLASSIFICATION	:	
CENTER,	:	
	:	
RESPONDENT	:	

ORDER

This habeas corpus challenges the constitutionality of Petitioner's restraint and the imposition of the death penalty by the Superior Court of Meriwether County. Petitioner was convicted of murder and rape. He received a death sentence for murder and a life sentence for rape. The Supreme Court affirmed both convictions but vacated the death sentence for murder and required a new trial solely on the issue of punishment for murder. Spraggins v. State, 240 Ga. 759 (1978). Upon retrial Petitioner again received a death sentence, which sentence was affirmed by the Supreme Court. Spraggins v. State, 243 Ga. 73 (1979). The Supreme Court of the United States vacated the death sentence and remanded the case for further consideration in light of Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980).

Upon reconsideration the Supreme Court reaffirmed the death sentence. Spraggins v. State, 246 Ga. 432 (1980). Certiorari was denied by the Supreme Court of the United States. Spraggins v. Georgia, _____U.S._____, 68 L.Ed.2d 312 (1981).

The Petition contains 19 numbered counts which allege substantive claims for relief (1-19). Evidence and argument have been presented on only 7 points, however, and the Court will only address these claims for relief (1, 2, 4, 7, 9, 14, 18). All unsupported allegations will be deemed abandoned and without merit.

The record in this case consists of the transcript of the proceedings before this Court on November 9, 1981, and the transcripts and records of Petitioner's trials in the Meriwether County Superior Court.

1.

In count 1, Petitioner claims he was denied his Sixth Amendment right to effective assistance of counsel at both trials and on appeal.

FINDINGS OF FACT

Petitioner was represented at both trials and on appeal by Vernon Belcher. (H.T. 5-6). Mr. Belcher has been a member of the Bar since 1941. (H.T. 14). Counsel estimated that 10-15% of his practice has been

in the area of criminal law. (H.T. 15). He had handled numerous capital cases prior to Petitioner's. (H.T. 15, 21).

Counsel testified that he conferred with Petitioner several times, prior to both the preliminary hearing and trial. (H.T. 7-8, 15-16). He represented Petitioner at the preliminary hearing. (H.T. 15). Counsel talked with Petitioner's family, went to the scene of the crime, talked with investigating officers, canvassed the area to see if there were evidence he did not know about, obtained Petitioner's school records, and made every effort he could think of to investigate. (H.T. 8).

The district attorney gave Counsel a copy of his entire file, including a list of witnesses, Petitioner's statements, and lab reports. (H.T. 15-16). Counsel discussed a possible plea since Petitioner had freely admitted his guilt, but the prosecutor was not receptive to the idea. (H.T. 21).

Among the motions Counsel filed prior to the first trial was a motion for a psychiatric examination, which was granted. (R. 1st. Tr. 1-6). Counsel did not move for an independent psychiatric exam because he had no reason not to rely on the report from Central State Hospital. (H.T. 18, 20). Furthermore, he did not think the trial judge would have granted the request. (H.T. 20). Counsel did file a special plea of insanity and presented one witness, but the special

jury found Petitioner competent to stand trial. (R. 1st Tr. 17-19, T.1st. Tr. 3-8).

At Petitioner's first trial, Counsel made an opening statement though it was not recorded (T. 1st Tr. 2); cross-examined witnesses (T. 1st Tr. 30; 36; 46; 57; 60; 61; 73; 83; 90); made motions (T.1st Tr. 52;122); offered three witnesses during the guilt/innocence phase, including Petitioner (T. 1st. Tr. 98; 102; 108); and made closing arguments in both the guilt/innocence and sentencing phases. (T. 1st. Tr. 126-130;161, 175-176).

At Petitioner's resentencing trial, Counsel filed motions (R. 2d Tr. 8-16); made an opening statement (T. 2d Tr. 83-86); cross-examined witnesses (T. 2d Tr. 94; 96; 102; 108; 116; 120; 127; 149; 153; 161; 183; 192; 194; 196; 202; 205); made motions (T. 2d. Tr. 126; 282; 304); presented two witnesses including Petitioner (T. 2d. Tr. 207; 225); and made a closing argument (T. 2d. Tr. 288-295).

CONCLUSIONS OF LAW

The Sixth Amendment right to counsel means "...not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960); Pitts v. Glass, 231 Ga. 638 (1974).

Petitioner's Counsel easily meets this test. Mr. Belcher was experienced in the trial of criminal

cases. He prepared for and advocated Petitioner's cause in a reasonably effective manner. The effort he put forth was certainly reasonably effective within the meaning of the standard.

Petitioner claims Counsel ineffectively handled voir dire at the resentencing trial in failing to ask prospective jurors about their knowledge of Petitioner's first trial and its outcome. A reading of the voir dire transcript indicates the district attorney had already questioned the prospective jurors on this subject. (T. 2d. Tr. 3-4; 13-14; 22-23; 34-35; 43-44). As a result, three people were excused because of their lack of impartiality or their previous knowledge of the case. (T. 2d. Tr. 27; 44; 46-47).

Petitioner has also claimed Counsel was ineffective for not requesting an independent psychiatric exam. Yet, Petitioner has made no showing that such an exam would have been helpful or would have differed from the Central State evaluation of Petitioner's competency. The Court cannot conclude Counsel was ineffective for this reason.

Accordingly, the allegation in Count 1 is found to be without merit.

2.

In count 2, Petitioner contends that the submission of a statutory aggravating circumstance at his resentencing trial, which was not submitted at his first trial, violated

the Fifth Amendment ban against double jeopardy and his Fourteenth Amendment right to due process of law.

FINDINGS OF FACT

At Petitioner's first sentencing trial, the State submitted one statutory aggravating circumstance, Ga. Code Ann. §27-2534.1(b)(2). (R. 1st. Tr. 24-25). The jury found its existence and imposed a death sentence (R. 1st. Tr. 26). On appeal, Petitioner's death sentence was vacated for defects in the trial court's instructions to the jury. Spraggins v. State, 240 Ga. at 763.

At the resentencing trial, the State introduced two statutory aggravating circumstances, Code Ann. §27-2534.1 (b)(2) and (b)(7). (R. 2nd. Tr. 6-7). The jury found the existence of the (b)(7) aggravating circumstance and imposed a death sentence. (R. 2d. Tr. 20).

CONCLUSIONS OF LAW

Petitioner relies upon Bullington v. Missouri, ____U.S.____, 101 S.Ct.____, 68 L.Ed.2d 270 (1981), to assert that the State was barred by the Fifth Amendment double jeopardy clause from introducing the (b)(7) aggravating circumstance at the resentencing trial because it was not sought at his first sentencing trial.

Bullington is distinguishable upon its facts from the case at bar in that "In Bullington there was a life sentence imposed at the first sentencing

procedure whereas in the instant case a death penalty was imposed. Therefore, the danger of repeated attempts by the State to wear a defendant down and obtain the desired result is not present." Godfrey v. State, ___ Ga. ___ (No. 37683, 37684, decided November 24, 1981), slip. op. at 5.

The Court in Godfrey held that the State is not limited to the aggravating circumstances relied upon at the first sentencing trial. "We do not agree that failure to submit aggravating circumstances which are raised by the evidence is an implied directed verdict of acquittal on these aggravating circumstances. Godfrey, supra, slip. op. at 6."

Under the rule announced in Godfrey, Petitioner's rights were not violated by the State's introduction of the (b)(7) aggravating circumstance at his resentencing trial.

Accordingly, the allegation in count 2 is found to be without merit.

4.

In count 4, Petitioner alleges that the written copy of the jury charge, which went out with the resentencing jury, was identical to the defective charge at Petitioner's first sentencing charge so that its use violated his Sixth, Eighth, and Fourteenth Amendment rights. Specifically, Petitioner

alleges that the copy did not point out that the jury could recommend a life sentence even if they found the existence of one or more statutory aggravating circumstances or specify mitigating circumstances.

FINDINGS OF FACT

The Supreme Court has already concluded that the trial court's instructions at Petitioner's resentencing trial were not defective. Spraggins v. State, 243 Ga. at 76.

CONCLUSIONS OF LAW

The "copy" of which Petitioner complains was not a complete copy of the trial court's charge but merely a guide to the jury in formulating its verdict as required by Code Ann. §27-2534.1(c). (Cf. R. 2d. Tr. 18-19). Written material furnished to the jury pursuant to §27-2534.1(c) is purely of a procedural nature and amounts to nothing more than a written formulation of the jury's potential verdicts. Collier v. State, 244 Ga. 553, 569 (1979); Collins v. State, 243 Ga. 291 (1979). There is no reason to assume the jury disregarded the trial court's oral instructions on aggravating and mitigating circumstances.

Accordingly, this allegation is found to be without merit.

7.

The Supreme Court has already concluded that

the closing argument made by the district attorney at the resentencing trial was within the permissible range afforded a prosecutor seeking the death penalty. Spraggins v. State, 243 Ga. at 74.

9.

In count 9, Petitioner challenges the constitutionality of the Ga. Code Ann. §27-2534.1(b)(7) statutory aggravating circumstance.

The (b)(7) statutory aggravating circumstance has been held to be constitutional. Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d.398 (1980). Furthermore, the Supreme Court has expressly reaffirmed the jury's finding of the (b)(7) statutory aggravating circumstance in this case in light of Godfrey. Spraggins v. State, 246 Ga. at 434.

Accordingly, this allegation is found to be without merit.

14.

The Supreme Court has already concluded Petitioner's death sentence was not imposed under the influence of passion, prejudice or any other arbitrary factor. Spraggins v. State, 243 Ga. at 76.

18.

In count 18, Petitioner attacks the appellate review process under the Georgia death penalty statute.

Georgia's death penalty statute has been held constitutional. Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). Furthermore, the Supreme Court has conducted its sentence review and determined Petitoner's death sentence was not imposed under the influence of passion, prejudice or any other arbitrary factor nor excessive or disproportionate. Spraggins v. State, 243 Ga. at 76.

Petitioner has not shown the sentence review in this case was improper or insufficient.

Accordingly, this allegation is found to be without merit.

WHEREFORE, all allegations in the Petition having been found to be without merit, the Petition is denied.

SO ORDERED, this 4 day of January, 1982.

Alex Crumbley

ALEX CRUMBLEY
JUDGE SUPERIOR COURTS
FLINT JUDICIAL CIRCUIT

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States, which provides in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense;"

the Eighth Amendment to the Constitution of the United States, which provides in relevant part:

> "... nor cruel and unusual punishments inflicted;"

and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> "No State shall... deprive any person of life, liberty, or property, without due process of law."

The following are those provisions of the Constitution of Georgia of 1976 that are involved in this case:

GA. CONST. art. I §2-101

No person shall be deprived of life, liberty, or property, except by due process of law.

GA CONST. art. I §2-111

Every person charged with an offense against the laws of this State shall have the privilege and benefit of counsel; shall be furnished, on demand, with a copy of the accusation, and a list of the witnesses on whose testimony the charge against him is founded; shall have compulsory process to obtain the testimony of his own witnesses; shall be confronted with the witnesses testifying against him; and shall have a public and speedy trial by an impartial jury.

Appendix B

The following are those provions of the Georgia Code Annotated that are involved in this case:

27-2206 Counsel prohibited from arguing possibility of executive clemency; mistrial for violation of rule

No attorney at law in a criminal case shall argue to or in the presence of the jury that a defendant, if convicted, may not be required to suffer the full penalty imposed by the court or jury, because pardon, parole, or clemency of any nature may be granted by the Governor, State Board of Pardons and Paroles, or other proper authority vested with the right to grant clemency. If counsel for either side in a criminal case should so argue to the jury, opposing counsel shall have the right to immediately request the court to declare a mistrial; and in which case, it shall be mandatory upon the court to declare a mistrial; and upon failure so to do, same shall constitute reversible error.

This section shall be construed as setting forth regulations in addition to those provided for in section 24-3319 and section 81-1009.

(Acts 1955, pp. 191, 192.)

27-2503 Presentence hearings in felony cases

(a) Except in cases in which the death penalty may be imposed, upon the return of a verdict of "guilty" by the jury in any felony case, the judge shall dismiss the jury and shall conduct a presentence hearing at which the only issue shall be the determination of punishment to be imposed.

In such hearing the judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any prior conviction and pleas: Provided, however, that only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible. The judge shall also hear argument by the defendant or his counsel and the prosecuting attorney, as provided by law, regarding the punishment to be imposed. The prosecuting attorney shall open and the defendant shall conclude the argument. In cases in which the death penalty may be imposed, the judge when sitting without a jury shall follow the additional procedure provided in section 27-2534.1. Upon the conclusion of the evidence and arguments the judge shall impose the sentence or shall recess the trial for the purpose of taking the sentence to be imposed under advisement. The judge shall fix a sentence within the limits prescribed by law. If the trial court is reversed on appeal because of error only in the presentence hearing, the new trial which may be ordered shall apply only to the issue of punishment.

(b) In all cases in which the death penalty may be imposed and which are tried by a jury, upon a return of a verdict of guilty by the jury, the court shall resume the trial and conduct a presentence hearing before the jury. Such hearing shall be conducted in the same manner as presentence hearings conducted before the judge as provided in subsection (a) of this section. Upon the conclusion of the

evidence and arguments, the judge shall give the jury appropriate instructions, and the jury shall retire to determine whether any mitigating or aggravating circumstances, as defined in section 27-2534.1, exist and whether to recommend mercy for the defendant. Upon the findings of the jury, the judge shall fix a sentence within the limits prescribed by law.

(Acts 1974, pp. 352, 257.)

27-2534.1 Mitigating and aggravating circumstances; death penalty

(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated

battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in section 27-2534.1(b) is so found, the death penalty shall not be imposed.

(Acts 1973, pp. 159, 163.)

27-2537 Review of death sentences

(a) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Georgia. The clerk of the trial court, within 10 days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of Georgia together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be

in the form of a standard questionnaire prepared and supplied by the Supreme Court of Georgia.

(b) The Supreme Court of Georgia shall consider the punishment as well as any errors enumerated by way of appeal.

(c) With regard to the sentence, the court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

(2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 27-2534.1(b), and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(d) Both the defendant and the State shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

(e) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(1) Affirm the sentance of death; or

(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred

to by the Supreme Court of Georgia in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration.

(f) There shall be an Assistant to the Supreme Court, who shall be an attorney appointed by the Chief Justice of Georgia and who shall serve at the pleasure of the court. The court shall accumulate the records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate. The Assistant shall provide the court with whatever extracted information it desires with respect thereto, including but not limited to a synopsis or brief of the facts in the record concerning the crime and the defendant.

(g) The court shall be authorized to employ an appropriate staff and such methods to compile such data as are deemed by the Chief Justice to be appropriate and relevant to the statutory questions concerning the validity of the sentence.

(h) The office of the Assistant shall be attached to the office of the Clerk of the Supreme Court of Georgia for administrative purposes.

(i) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.

(Acts 1973, pp. 159, 165.)

wife, and in ordering him to pay an indebtedness for a stove purchased for the wife's benefit.

This court will not control the discretion of the trial judge in awarding temporary alimony and attorney fees unless there is a manifest abuse of discretion. *Johnson v. Johnson*, 236 Ga. 647, 225 S.E.2d 36 (1976); *Wilbanks v. Wilbanks*, supra. After reviewing the record of the hearing, we find evidence to support the award of temporary alimony to the wife, and no abuse of discretion.

Judgment affirmed.

All the Justices concur.



243 Ga. 73

SPRAGGINS

—v.

The STATE.

No. 34289.

Supreme Court of Georgia.

Argued Jan. 8, 1979.

Decided Feb. 6, 1979.

Following remand for new trial on issue of punishment to be imposed following conviction for rape and murder, 240 Ga. 327, 240 S.E.2d 833, the Meriwether Superior Court, Jackson, J., entered death sentence on jury verdict, and defendant appealed. The Supreme Court, Bowles, J., held that: (1) closing argument by district attorney, that defendant might not be required to suffer full penalty imposed by court or jury because pardon, parole or clemency might be granted, was within permissible range afforded to prosecuting attorney who is seeking death penalty; (2) written list of aggravating circumstances was properly given to jury to be carried with them into jury room; (3) verdict was not improperly prepared in open court under instructions of district attorney; (4) record demonstrated that sentence of death was not imposed under influence of passion, prejudice or any other arbitrary factor; (5) evidence supported jury's finding of aggravated circumstance, and (6) sentence of death was not excessive or disproportionate considering both crime and defendant.

Affirmed.

1. Criminal Law ⇐723(1)

Closing argument by district attorney in murder-rape prosecution, that defendant might not be required to suffer full penalty imposed by court or jury because pardon, parole or clemency might be granted, was within permissible range afforded to prosecuting attorney who is seeking death penalty. Code, § 27–2206.

2. Criminal Law ⇐730(14)

Even if closing argument by district attorney in murder-rape prosecution, that defendant might not be required to suffer full penalty imposed by court or jury because pardon, parole or clemency might be granted, was improper, such impropriety was cured by trial judge's corrective instruction. Code, § 27–2206.

3. Criminal Law ⇐858(1)

In murder-rape prosecution, written list of aggravating circumstances was properly given to jury to be carried with them into jury room. Code, § 27–2534.1(c).

4. Criminal Law ⇐857(1)

Verdict in murder-rape prosecution was not improperly prepared in open court under instructions of district attorney, where foreman stated that the verdict had been reached in jury room, where, because verdict form had not been completed in accordance with court's instructions, district attorney handed verdict form back to foreman and instructed her to strike out the inapplicable verdict, where the court reiterated such instruction to the foreman, and where the jurors were polled and each answered that verdict was his own, freely and voluntarily given.

5. Criminal Law ⇐768(1)

Jury instruction in murder-rape prosecution, that "It is not wise to immediately express a determination or insist upon a certain verdict," did not encroach upon the jury's deliberation function.

6. Homicide ⇐354

Record in murder-rape prosecution demonstrated that sentence of death imposed upon defendant was not imposed under influence of passion, prejudice or any other arbitrary factor. Code, § 27-2537(c)(1).

7. Homicide ⇐354

Evidence in murder-rape prosecution in which death penalty was imposed supported jury's finding of an aggravating circumstance, viz., that the murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture and depravity of mind on part of defendant or aggravated battery to the victim.

8. Criminal Law ⇐193

No double jeopardy violations occurred, in resentencing trial on convictions of rape and murder, by submission to jury of list of aggravating circumstances to be considered.

9. Criminal Law ⇐1206(2)

Sentence of death imposed in murder-rape prosecution was not excessive or disproportionate considering both crime and defendant. Code, § 27-2537(c)(3).

A. Vernon Belcher, Greenville, for appellant.

Arthur K. Bolton, Atty. Gen., John W. Dunsmore, Jr., Asst. Atty. Gen., William F. Lee, Jr., Dist. Atty., for appellee.

BOWLES, Justice.

The appellant, Eddie Spraggins, was indicted by a grand jury in Meriwether County for the January 31, 1977, rape and murder of Frances Coe. He was tried by a jury and found guilty of both offenses.

In *Spraggins v. State*, 240 Ga. 759, 243 S.E.2d 20 (1978), appellant's conviction and life sentence for rape were affirmed. However, because the court in its sentencing instructions failed to make clear to the jury that they could recommend a life sentence even if they found the existence of a statutory aggravating circumstance (*Fleming v. State*, 240 Ga. 142, 240 S.E.2d 37 (1977)); and failed to inform the jury that they were authorized to consider mitigating circumstances, as required by Code Ann. §§ 27-2534.1(b) and 27-2534.1(c), (*Hawes v. State*, 240 Ga. 327(9), 240 S.E.2d 833 (1977)), appellant's sentence of death for murder was reversed and a new trial ordered on the issue of punishment.

Upon resentencing, the jury found that the murder was "outrageously and wantonly vile, horrible, and inhuman in that it involved torture and depravity of mind on the part of the defendant, or an aggravated battery to the victim." Code Ann. § 27-2534.1(b)(7). A verdict was returned for the death penalty and appellant was sentenced to death.

The case is here on direct appeal and for mandatory review of the death sentence imposed. Code Ann. § 27-2537. The facts surrounding the murder and rape of Frances Coe are set out in *Spraggins v. State*, supra, and its companion case, *Davis v. State*, 240 Ga. 763, 243 S.E.2d 12 (1978).

1. In his first enumeration of error, appellant complains that the trial court erred in denying his motion for mistrial, made after the district attorney's request for the death penalty in closing argument. Appellant argues that the district attorney's statement violated Code Ann. § 27-2206, which forbids a prosecutor from arguing that a defendant may not be required to suffer the full penalty imposed by the court or jury, because pardon, parole or clemency of any nature may be granted. Although the trial judge overruled appellant's motion for mistrial, he did instruct the jury not to consider whether, if given a life sentence, appellant might be paroled.

[1] We have reviewed the closing argument made by the district attorney and find it to be within the permissible range afforded to a prosecuting attorney who is seeking

the death penalty. *Redd v. State*, 242 Ga. 876, 252 S.E.2d 383 (1979); *Mason v. State*, 236 Ga. 46, 222 S.E.2d 339 (1976); *Tamplin v. State*, 235 Ga. 20(4), 218 S.E.2d 779 (1975).

[2] Even assuming arguendo that the argument was improper, it was cured by the judge's corrective instruction. *Pryor v. State*, 238 Ga. 698(7), 234 S.E.2d 918 (1977). The trial judge did not err in refusing to grant appellant's motion for mistrial.

[3] 2. Appellant complains that it was error to give to the jury a list of aggravating circumstances put forth by the State to be carried with them into the jury room.

Code Ann. § 27-2534.1(c) requires that the trial judge give the statutory instructions warranted by the evidence to the jury in its charge and in writing. There was evidence to support the aggravating circumstances given to the jury in the charge and in writing. *Harris v. State*, 237 Ga. 718, 230 S.E.2d 1 (1976); *Douthit v. State*, 239 Ga. 81(6), 235 S.E.2d 493 (1977). As the law requires that the written list of aggravating circumstances as charged by the court be given to the jury for use in its deliberations, there is no merit to appellant's second argument. The form given to the jury in this case complied with the law and conformed to the evidence.

[4] 3. Appellant complains that the jury prepared its verdict in open court under the instructions of the district attorney.

A review of the transcript shows that the jury reached its verdict in the jury room. The foreman announced, in open court, that a verdict had been reached. Because the verdict form, when handed to the district attorney, had not been completed in accordance with the court's earlier instruction, the district attorney handed the form back to the foreman, and instructed her to strike out one of the two verdicts which did not apply. The court reiterated this instruction to the foreman. No objection was made by appellant.

We find no error. The foreman stated that the verdict had been reached in the jury room. The jurors were polled, and each answered that the verdict was his own, freely and voluntarily given. No harm is shown to have resulted from the instruction given.

Appellant's third enumeration of error is without merit.

[5] 4. Appellant complains that the trial court infringed on the jury's exclusive authority by instructing that, "It is not wise to immediately express a determination or insist upon a certain verdict." We do not agree with appellant's contention.

The court's instruction did not encroach on the jury's deliberation function. Appellant's fourth enumeration of error has no merit.

[6] 5. Sentence Review. Our sentence review has included consideration of the aggravating circumstances found by the jury and the evidence introduced in court concerning the crime and the defendant. After a thorough review of the record and transcript, we conclude that the sentence of death imposed on Eddie Spraggins was not imposed under the influence of passion, prejudice or any other arbitrary factor. Code Ann. § 27-2537(c)(1).

[7, 8] The evidence supports the jury's finding of an aggravating circumstance, namely that the offense of murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture and depravity of mind on the part of the defendant or an aggravated battery to the victim. No double jeopardy violations occurred in the court's submission to the jury of the list of aggravating circumstances to be considered on resentencing. *Redd v. State*, supra.

We have reviewed the instructions given by the trial judge on resentencing and find that they are not subject to the defects dealt with in our decisions in *Fleming v. State*, supra, and *Hawes v. State*, supra.

In reviewing the death penalty in this case, we have considered the cases appealed to this court since January 1, 1970, in which a death or life sentence was imposed for murder, and we find the cases listed in the

appendix support affirmance of the death penalty.

[9] Eddie Spraggins' sentence to death for murder is not excessive or disproportionate considering both the crime and the defendant. Code Ann. § 27-2537(c)(3). The verdict is factually supported.

Judgment affirmed.

All the Justices concur.

APPENDIX

House v. State, 232 Ga. 140, 205 S.E.2d 217 (1974); *Gregg v. State*, 233 Ga. 117, 210 S.E.2d 659 (1974); *Floyd v. State*, 233 Ga. 280, 210 S.E.2d 810 (1974); *Chenault v. State*, 234 Ga. 216, 215 S.E.2d 223 (1975); *Smith v. State*, 236 Ga. 12, 222 S.E.2d 308 (1976); *Birt v. State*, 236 Ga. 815, 225 S.E.2d 248 (1976); *Coleman v. State*, 237 Ga. 84, 226 S.E.2d 911 (1976); *Isaacs v. State*, 237 Ga. 105, 226 S.E.2d 922 (1976); *Dungee v. State*, 237 Ga. 218, 227 S.E.2d 746 (1976); *Banks v. State*, 237 Ga. 325, 227 S.E.2d 380 (1976); *Young v. State*, 239 Ga. 53, 236 S.E.2d 1 (1977); *Gaddis v. State*, 239 Ga. 238, 236 S.E.2d 594 (1977); *Peek v. State*, 239 Ga. 422, 238 S.E.2d 12 (1977); *Bowden v. State*, 239 Ga. 821, 238 S.E.2d 905 (1977); *Westbrook v. State*, 242 Ga. 151, 249 S.E.2d 524 (1978); *Finney v. State*, 242 Ga. 582, 250 S.E.2d 388 (1978); *Davis v. State*, 242 Ga. 901, 252 S.E.2d 443 (1979).



243 Ga. 91

WANSOR

v.

GEORGE HANTSCHO COMPANY, INC. et al.

No. 34453.

Supreme Court of Georgia.

Argued Jan. 16, 1979.

Decided Feb. 6, 1979.

In case involving question certified from United States Court of Appeals, Fifth Circuit, the Supreme Court, Undercofler, P. J., held that where product was manufactured in 1960–61, product was purchased and installed in 1961, Georgia Legislature amended statute in 1968 to overcome privity limitations on tort recoveries, product caused injury to individual in 1971 due to product's alleged defective condition, doctrine of strict liability in tort did not apply to product, since to apply 1968 statute, which created a new cause of action in Georgia applicable to manufacturer of any personal property sold as new property, to product sold in 1961 would violate applicable statute forbidding retrospective application of laws.

Certified question answered in negative.

Products Liability ⇐2

Where product was manufactured in 1960–61, product was purchased and installed in 1961, Georgia Legislature amended statute in 1968 to overcome privity limitations on tort recoveries, product caused injury to individual in 1971 due to product's alleged defective condition, doctrine of strict liability in tort did not apply to product, since to apply 1968 statute, which created a new cause of action in Georgia applicable to manufacturer of any personal property sold as new property, to product sold in 1961 would violate applicable statute forbidding retrospective application of laws. Code, §§ 102–104, 105–106.

Johnson, Ward, Stanfield, Lanham & Carr, Cullen M. Ward, Clark H. McGehee, Atlanta, for appellant.

N. Forrest Montet, David M. Leonard, Hurt, Richardson, Garner, Todd & Cadenhead, T. Cullen Gilliland, Atlanta, for appellees.

UNDERCOFLER, Presiding Justice.

The following question has been certified to this court from the United States Court

[12] 7. The jury sentenced Redd to death after finding him guilty of murder in the course of kidnapping with bodily harm to the victim, which is an aggravating circumstance authorizing the ultimate penalty under Code Ann. § 27-2534.1(b)(2). In Enumeration 10 Redd argues correctly that his death sentence must be set aside for failure of the trial court to make clear to the jury in his charge taken as a whole that they might in their discretion recommend a life sentence even if they found the existence of a statutory aggravating circumstance. *Hawes v. State*, 240 Ga. 327, 240 S.E.2d 833 (1977); *Fleming v. State*, 240 Ga. 142, 240 S.E.2d 37 (1977). The lack of clarity in the charge was raised below by specific objection by Redd's attorney, but no recharge was made. Accordingly, the death sentence must be overturned and Redd must be resentenced, which also has the effect of mooting Enumerations 9, 11 and 12 which attack other aspects of the sentencing procedure.

Redd's conviction and life sentence for kidnapping are affirmed. His murder conviction is affirmed, but the sentence is set aside and a new trial is ordered on the issue of punishment for that offense.

Judgment affirmed in part and reversed in part.

All the Justices concur, except JORDAN, J., who dissents.

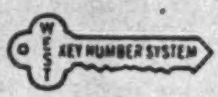
JORDAN, Justice, dissenting.

I dissent to Division 7 of the opinion in which the death sentence is set aside and a new trial ordered as to punishment. In my opinion the charge taken as a whole meets the requirement of the law.

On the punishment phase of the trial, the court charged the jury to "consider all of the evidence received by you in open court, in both phases of the trial. You are authorized to consider all the facts and circumstances of the case." The charge made it clear that the crimes for which the defendant had been found guilty were punishable by death *or* life, and that it was their duty to determine the penalty within the established limits. The court further correctly charged that "before you would be authorized to find a verdict fixing a sentence of death . . . , you must find evidence of statutory aggravating circumstances . ."

In my opinion this charge made it quite clear that the jury could consider all of the facts and circumstances of the case, including evidence in mitigation and aggravation, in order to arrive at the proper penalty and that they were authorized to fix the punishment at *either* death or life. The charge on aggravating circumstances did not mandate a sentence of death if such was found, but merely *authorized* the death penalty.

I think the jury fully understood its duties and prerogatives under the charge as given. I would affirm.



240 Ga. 759

Eddie SPRAGGINS

v.

The STATE.

No. 32605.

Supreme Court of Georgia.

Feb. 21, 1978.

Defendant was convicted before the Superior Court, Meriwether County, Joseph C. Jackson, J., of rape and murder, and he appealed. The Supreme Court, Hill, J., held that: (1) evidence was sufficient to sustain convictions; (2) GBI agent's voluntary testimony that defendant was known to have been drinking on night before offenses and that agent had learned that defendant "was the type [of] person * * * who got into fights. They had a bit of trouble with him periodically" was not so prejudicial that it could not be cured by certain instructions, but (3) failure to instruct that jury could

recommend life sentence even if they found existence of a statutory aggravating circumstance and that they were authorized to consider mitigating circumstances was error requiring that death penalty be set aside and that there be a new sentencing trial.

Judgment affirmed as to the convictions; reversed as to the death sentence for murder.

Jordan, J., dissented to the reversal of death sentence for reasons set forth in another case.

1. Homicide ⇐250
Rape ⇐51(1)

Evidence, including defendant's statement to effect that he had killed victim and circumstantial evidence of carnal knowledge of victim, was sufficient to sustain defendant's conviction of rape and murder. Code, § 26-2001.

2. Criminal Law ⇐1169.5(4)

In proceeding in which defendant was convicted of rape and murder, GBI agent's voluntary testimony that defendant was known to have been drinking on night before offenses and that agent had learned that defendant "was the type [of] person * * * who got into fights. They had a bit of trouble with him periodically" was not so prejudicial that it could not be cured by instructions that jury was to disregard anything said about defendant in regard to drinking or trouble he might have had with police and that State had burden of proving that defendant committed crime for which he was charged. Code, § 38-202.

3. Homicide ⇐311, 341

In proceeding in which defendant was convicted of rape and murder and was sentenced to death, failure to instruct that jury could recommend life sentence even if they found existence of a statutory aggravating circumstance and that they were authorized to consider mitigating circumstances was error requiring that death penalty be set aside and that there be a new sentencing trial. Code, §§ 27-2503, 27-2534.1(b), (b)(2, 4, 7), (c), 27-2537(c)(1).

A. Vernon Belcher, Greenville, for appellant.

William F. Lee, Jr., Dist. Atty., Greenville, Arthur K. Bolton, Atty. Gen., John W. Dunsmore, Jr., Asst. Atty. Gen., Atlanta, for appellee.

HILL, Justice.

This is a death case. The defendant Eddie Spraggins, along with Freddie Davis,[1] was indicted in Meriwether County for the January 31, 1977, rape and murder of Miss Frances Coe. After a special jury found the defendant sane at time of trial, he was tried and found guilty on March 1 and 2, 1977, on both counts. Upon the jury's finding of a statutory aggravating circumstance to the murder charge, that the murder was committed while the offender was engaged in the rape, the defendant was sentenced to death for murder and life imprisonment for rape.

Evidence was presented from which the trial jury was authorized to find the following: On the afternoon of January 31, 1977, the semi-nude body of Frances Coe, age about 55, was found in her home in Manchester, Georgia. She had been repeatedly stabbed, slashed and cut, including having her throat cut. There were several wounds to the body which caused the victim to bleed heavily, with the most severe stab wounds being in the upper abdomen and lower chest, including two in the upper abdomen which penetrated the heart. She had been partially disembowelled. Death was attributed to a loss of blood.

The victim was found lying partially on her bed. Her sweater was open, her slip had been pulled up and her pantyhose and panties had been pulled down. There was testimony that there had been manipulation of the victim's sexual organs. There were bruises on her thigh and in the vicinity of the vaginal opening. There was hemorrhaging around the urethra and a small tear in the vaginal orifice. Doctor Byron

1. See *Davis v. State*, 240 Ga. 763, 243 S.E.2d 12 (1978).

Dawson who performed the autopsy testified that although no sperm cells were found, in his opinion the injuries he described were consistent with those associated with sexual relations.

The defendant and the victim were neighbors. The night of the murder the defendant was seen burning something in his back yard. A zipper and cloth material and a flashlight of the type owned by the victim were recovered from the ashes.

When told that there was a warrant out for his arrest, the defendant stated that there was nothing to it, that he had hit somebody but that he did not get any money out of her.

In a pre-trial statement to a GBI agent (following appropriate advice concerning his rights) the 34-year-old defendant was quoted as follows: "On Sunday night, the 30th of January, 1977, Freddie Davis and I went to Frances Coe's house. We had been talking about robbing Frances Coe for a long time. We stopped at the back of the house, and I told Freddie to stay at the back and I went to the front, knocked on the door and Frances Coe let me in. I told her I wanted to use the telephone. I told her to open the back door and let Freddie in. I hit her and she started screaming. I got her around the neck and held her while I opened the back door. Freddie came in. I pulled her back into the bedroom. I had my hand over her mouth to keep her from hollering. Freddie said, 'Shut her up,' and handed me his knife, and I opened the knife and stabbed her and cut her throat. She just would not die and I just kept cutting. Freddie said, 'You got to finish her off.' I wiped the blood off my hands on a towel. I gave the knife back to Freddie. Freddie got her flashlight looking for money. After we left, he gave me the light. I burned it and a blue windbreaker behind my house."

The defendant presented two witnesses in addition to his own testimony. One witness testified that the defendant had worked for her husband but that he could only perform small uncomplicated menial tasks helping her husband do odd jobs around the house. She said that he could not count change for a dollar, and that she did not think he could read or write. The defendant's sister testified that he could never learn in school and always had mental problems and they sought help for him in a number of different places.

The defendant testified that he did not remember going to Frances Coe's house; that he drank heavily; that he did not rape her, nor had he ever raped anyone; that he could not read; and that he had never told law enforcement officers that he had participated in her killing.

On cross examination the defendant admitted he had burned several coats and "I might have did burn the flashlight too." He admitted that when he was arrested he was in the trunk of Buddy Mullis' automobile, and stated that he was not exactly hiding and that he found it comfortable in the trunk because it was a good place where he could lie down and rest when he wanted to be by himself.

On appeal the defendant enumerates two errors.

[1] 1. In the defendant's first enumeration he asserts that the trial court erred in denying his motion for new trial based on the general grounds. The evidence as to murder is more than adequate. In view of the death of the victim there is, however, no direct evidence as to the rape. Specifically, the evidence as to the second element of carnal knowledge, Code § 26–2001, is circumstantial at most. Considering all the facts and circumstances, however, we find that there was sufficient evidence regarding rape to support the jury's verdict. *Harris v. State*, 236 Ga. 242(1), 223 S.E.2d 643 (1976). It was not error to overrule the motion for new trial based on the general grounds.

[2] 2. In Enumeration 2 defendant asserts that the trial court erred in denying his motion for mistrial when a GBI agent voluntarily testified as to the defendant's character.

While the officer was testifying for the state the district attorney asked him: "Q.

Now, based on the evidence that you gathered in your investigation, you confronted the defendant Eddie Spraggins, is that correct?" The officer deviated, saying: "A. Not at this time. We continued to gather other things. Eddie Spraggins was known to have been drinking the night before and in this area. I did a little background work on Eddie Spraggins from the police department and learned that he was the type person, you know, who got into fights. They had a bit of trouble with him periodically. In addition to this, just prior to—" The district attorney interrupted asking: "Q. But, you did eventually go to him, is that correct?" The officer answered: "A. Oh, yes sir. I did eventually go to him. I was just telling you the background, what led me to him." The district attorney next asked the officer if he had had a conversation with the defendant.

Thereafter the jury was excused and a *Jackson-Denno* hearing was held. At its conclusion, defendant's counsel moved for a mistrial because the officer had injected the defendant's bad character into evidence. The court overruled the motion for mistrial but on return of the jury the trial court instructed the jury as follows: "The court instructs you to disregard anything that might have been said pertaining to this defendant in regard to any drinking or any fighting or any conflicts, any trouble he might have been in with the Manchester Police Department, because that has no bearing on this case whatsoever. The purpose of this case is to determine whether or not this defendant did commit the crime for which he is charged. The state has the burden of proving that and not anything other than that shall be considered in the trial of this case."

We do not find that the officer's improper comments in the presence of the jury were so prejudicial that the curative instructions by the court were ineffective. The trial court did not abuse its discretion in refusing to grant the motion for mistrial. *Googe v. State*, 237 Ga. 175(1), 227 S.E.2d 51 (1976); *Lynch v. State*, 234 Ga. 446, 448, 216 S.E.2d 307 (1975); *Woods v. State*, 233 Ga. 495, 497–498, 212 S.E.2d 322 (1975); *Wingfield v. State*, 231 Ga. 92(8), 200 S.E.2d 708 (1973); Code Ann. § 38–202.

3. *Sentence review.*

[3] After finding the defendant guilty of murder and rape at the guilt-innocence phase of the trial, at the sentencing phase the jury found that the offense of murder was committed while the offender was engaged in the commission of another capital felony, the rape, and imposed the death penalty. This was the only aggravating circumstance as to which the defendant had been put on notice. Code Ann. § 27–2503. Cf. Code Ann. § 27–2534.1(b)(2), (4) and (7).

We first consider whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor. Code Ann. § 27–2537(c)(1).

The court's sentencing instructions failed to make clear to the jury that they could recommend a life sentence even if they found the existence of a statutory aggravating circumstance (*Fleming v. State*, 240 Ga. 142(7), 240 S.E.2d 37 (1977), and failed to inform the jury that they were authorized to consider mitigating circumstances in contravention of requirements laid down in Code Ann. §§ 27–2534.1(b) and 27–2534.1(c), *Hawes v. State*, 240 Ga. 327(9), 240 S.E.2d 833 (1977)). The jury instructions in the case before us failed to comply with the requirements of *Fleming* and *Hawes* and thus the death penalty must be set aside and a new sentencing trial allowed.

Judgment affirmed as to the convictions; reversed as to the death sentence for murder.

All the Justices concur, except JORDAN, J., who dissents from the reversal of the death sentence.

JORDAN, Justice, dissenting.

I dissent to the reversal of the death penalty for the reasons set forth in my dissent in *Redd v. State*, 240 Ga. 753, 243 S.E.2d 16 (1978).

Now, His Honor will charge you that the defendant comes into this court with the presumption of innocence in his favor and the burden rests upon the State to satisfy your minds to the reasonable doubt that this defendant is guilty and that he should be executed.

Now, with these brief remarks I am going to leave it with you and ask you to bring back a verdict here recommending mercy. Then the Judge will sentence him to life in prison and he will never get out. He is not even eligible until he has been in there for 25 years. And with these remarks, I thank you.

THE COURT: Ladies and gentlemen of the jury, this defendant has been found guilty of the offense of murder. It is now your duty to determine within the limits prescribed by law the penalty that shall be imposed for that offense.

Under the laws of this state, every person guilty of the offense of murder shall be punished by life imprisonment or death by electrocution. In all cases for which the death penalty may be authorized, the law provides that the judge

shall instruct the jury concerning any evidence in extenuation, mitigation and aggravation, which the jury may consider in making their decision as to what punishment is to be imposed upon the defendant.

In reaching your determination, you are authorized to consider all of the evidence received by you in open court.

You are authorized to consider all of the facts and circumstances of the case.

Ladies and gentlemen of the jury, in reaching your verdict you are authorized to consider all of the facts and circumstances, if you find there be any, in mitigation of punishment. In determining whether mitigating circumstances exist, you are authorized to consider all of the evidence produced by the State and the defendant throughout this trial.

Mitigating circumstances are those circumstances which do not constitute a justification or excuse for the crime, but which may be considered as extenuating or reducing the moral culpability or blame.

In reaching this verdict, you are not required to find mitigating circumstances

in order to recommend the sentence of life in prison. You may recommend a sentence of life imprisonment regardless of whether or not you believe mitigating circumstances exist in this case.

Ladies and gentlemen of the jury, I charge you that before you would be authorized to find a verdict fixing a sentence of death by electrocution, you must find evidence of statutory aggravating circumstances as I will define to you later in this charge, sufficient to authorize the supreme penalty of the law.

Aggravating circumstances are those which increase the guilt or enormity of the offense or as to its injurious consequences.

The law provides that when a party is tried by a jury, and is convicted of an offense that may be punished by death, the sentence of death shall not be imposed, unless the jury's verdict includes a finding of at least one aggravating statutory circumstance and a recommendation that the death sentence be imposed. When a statutory aggravating circumstance is found, and a recommendation of death is made, the Court shall sentence the defendant

to death.

When a sentence of death is not recommended by the jury, the Court shall sentence the defendant to prison for and during his natural life.

Therefore, before you would be authorized to recommend a sentence of death, in this case, you must find that the State has proved at least one of the following statutory aggravating circumstances to exist beyond a reasonable doubt:

One, the offense of murder was committed while the offendor was engaged in the commission of additional capital felonies, to wit, the rape of Frances Coe.

Two, the offense of murder was outrageously and wantonly vile, horrible and inhuman and in that it involved torture, depravity of mind on the part of the defendant, or an aggravated battery to the victim.

Now, ladies and gentlemen of the jury, a list of these aggravating circumstances that the State contends exist in this case are listed on a piece of paper and will be out with you in the jury room during your deliberations.

Ladies and gentlemen of the jury, if you do not find that the State has proved at least one of these statutory aggravating circumstances beyond a reasonable doubt, then you must recommend a sentence of life imprisonment.

If you should find that the State has proved at least one of the statutory aggravating circumstances beyond a reasonable doubt, then you still may, if you so choose, recommend a sentence of life imprisonment.

If you find the State has proved at least one of the statutory aggravating circumstances beyond a reasonable doubt, then you may recommend that the death penalty be imposed, but you are not required to do so.

Now, ladies and gentlemen of the jury, a reasonable doubt is a doubt for which you can give a reason, and means just what it says. It is the doubt of a fair-minded impartial juror honestly seeking the truth -- not an arbitrary or capricious doubt, but a doubt arising from a consideration of the evidence, or from a lack of evidence, or from a conflict of evidence.

Ladies and gentlemen of the jury, upon

retiring to the jury room, you will select one of you to act as foreman or forelady, who will preside over your deliberations, and who will sign the verdict to which all 12 of you freely and voluntarily agree. Your initial conduct upon entering the jury room is a matter of importance. It is not wise to immediately express a determination or insist upon a certain verdict. If your sense of pride is aroused, you may hesitate to change your position if you decide if you are wrong. Consult with one another and consider each other's views. Each of you must decide this case for yourselves, but you should do so only after a discussion and consideration of the case with your fellow jurors. Do not hesitate to change an opinion if you are convinced that it is wrong. However, you should never surrender honest convictions or opinions in order to be congenial, or to reach a verdict solely because of the opinions of other jurors.

Now, I charge you that the verdict you return in this case must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree

thereto. The verdict must be unanimous.

Now, ladies and gentlemen of the jury, after a careful consideration of all of the evidence, facts and circumstances of this case, under the rules of law that I have given you in charge, if your verdict should be death, then the form of your verdict would be:

"We, the jury, recommend death. We find the following aggravating circumstances:"

Listing the circumstances that you find.

On the otherhand, if you do not find that there was one or more aggravating circumstances, or it is your verdict that you do not recommend death in this case, then the form of your verdict would be:

"We, the jury, affix punishment at life."

Whatever your verdict may be, it can be written by filling in the blanks and marking out that which does not apply so as to make this form, which I have prepared for you, speak the true verdict of the jury. Please remember to mark out the part of the form that does not apply and fill in the blanks that do apply. Your verdict should be dated, and should be signed by your foreman.

Ladies and gentlemen of the jury, you may retire to fix the punishment in this case. You may begin deliberating as soon as you receive the indictment and all the evidence that was introduced in this case. However, ladies and gentlemen of the jury, before you retire, I hereby instruct the two alternate jurors to keep their seats until the other 12 jurors have gone to the jury room. Let this jury go to the jury room.

(Thereupon, the jury exited the hearing room.)

THE COURT: You all gather up the evidence.

Now, in regard to you two alternate jurors, you will not sit in on the deliberations of the jury in this matter unless you are needed later on. Another room has been made available to you where you will remain under guard by a court bailiff so you will be available if you are needed.

Let these two alternate jurors go to one of the witness rooms with a bailiff on guard.

(Thereupon, the two alternate jurors exited the hearing room.)

THE COURT: All right, you other bailiffs

gather up all this evidence including the indictment, the form of the verdict, and take it into the jury room for their consideration.

(Thereupon, a recess was taken while the jury deliberated the case.)

THE COURT: Let the record reflect that the jury has announced it has reached a verdict. The defendant is in the courtroom. The defendant's lawyer is in the courtroom.

Let the jury come in.

(Thereupon, the jury entered the hearing room.)

THE COURT: Let's everybody be seated and quiet.

Ladies and gentlemen of the jury, have you reached a verdict?

THE FOREMAN: Yes, we have.

THE COURT: The Court would like to announce that regardless of what the verdict is, there will be no outbursts. Everybody will remain seated until we have recessed court and the jury is escorted from the courtroom.

All right, receive the verdict, Mr. Lee.

MR. LEE: Madame Foreman, you must strike out one of the two verdicts. Don't strike out what does not apply. If you recommend life,

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THE STATE. : CASE NO. 1188

VS : MERIWETHER COUNTY

EDDIE SPRAGGINS : SUPERIOR COURT

CRIM. MIN. BOOK 10 PAGE 526

PUNISHMENT CHARGE

LADIES AND GENTLEMEN OF THE JURY, THE DEFENDANT IN THIS CASE HAS BEEN FOUND GUILTY OF THE OFFENSE OF MURDER, AND IT IS YOUR DUTY TO DETERMINE, WITHIN THE LIMITS PRESCRIBED BY LAW, THE PENALTY WHICH SHALL BE IMPOSED AS PUNISHMENT FOR THAT OFFENSE.

UNDER THE LAWS OF THIS STATE, PUNISHMENT FOR THIS OFFENSE IS DEATH BY ELECTROCUTION, OR BY LIFE IN PRISON. I CHARGE YOU THA TO RETURN A VERDICT RECOMMENDING DEATH, THERE MUST BE SOME AGGRAVA CIRCUMSTANCE, OR CIRCUMSTANCES FOUND BEYOND A REASONABLE DOUBT.

I CHARGE YOU THAT YOU MAY LOOK TO SEE IF THERE WAS ANY ONE OR MORE OF THE FOLLOWING AGGRAVATING CIRCUMSTANCES:

(1) The offense of murder was committed while the offender was engaged in the commission of an additional capital felony, to-wit: the Rape of Frances Coe.

CRIM. MIN. BOOK 10 PAGE 527

(2) The offense of Murder was outrageously and wantonly vile, horricle and inhuman in that it involved torture, depravity of mind on the part of the defendant, or an aggravated battery to the victim.

IF YOU FIND THERE WAS ONE OR MORE OF THESE AGGRAVATING CIRCUMSTANCES, ESTABLISHED BEYOND A REASONABLE DOUBT, YOU MAY FIX PUNISHMENT AT DEATH.

IN THIS EVENT, THE FORM OF YOUR VERDICT WOULD BE:

"WE, THE JURY, RECOMMEND DEATH". "WE FIND THE FOLLOWING AGGRAVATING CIRCUMSTANCES; (1) The offense of murder was committed while the offender was engaged in the commission of an additional capital felony, to-wit: -the Rape of Frances Coe.

CRIM. MIN. BOOK 10 PAGE 528

(2) The offense of Murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture, depravity of mind on the part of the defendant, or an aggravated battery to the victim.

IF YOU DO NOT FIND THAT THERE WAS ONE OR MORE AGGRAVATING CIRCUMSTANCES, THEN THE FORM OF YOUR VERDICT WOULD BE, "WE, THE JURY, FIX PUNISHMENT AT LIFE".

WHATEVER YOUR VERDICT MAY BE, IT CAN BE WRITTEN BY FILLING IN THE BLANKS, AND MARKING OUT THAT WHICH DOES NOT APPLY SO AS TO MAKE THIS FORM WHICH I HAVE PREPARED FOR YOU SPEAK THE TRUE VERDICT OF THE JURY.

THE VERDICT SHOULD BE DATED AND SIGNED BY ONE OF YOUR MEMBERS AS FOREMAN.

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